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No. 14-1146

IN THE SUPREME COURT OF THE UNITED STATES

TYSON FOODS, INC.
Petitioner,

v.

PEG BOUAPHAKEO, et al., individually and on behalf of all other similarly situated individuals,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AND METALS SERVICE CENTER INSTITUTE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. STATISTICAL SAMPLING SHOULD NOT BE ALLOWED TO OBSCURE THE INCLUSION OF UNINJURED CLASS MEMBERS 5

A. Principles of Standing Should Preclude Courts From Certifying Classes That Include Members Who Have No Injury 5

B. The Presence of Uninjured Class Members Has Become Problematic in Many Types of Class Actions 8

II. THE COURT SHOULD SET GUIDELINES FOR WHEN, IF EVER, STATISTICAL MODELS CAN OVERCOME DISTINCTIONS AMONG CLASS MEMBERS 12

III. ALLOWING PLAINTIFFS TO OBSCURE DEFICIENCIES IN THEIR CASES WILL ENCOURAGE SPECULATIVE LITIGATION 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases **Page**

Amchem Prods. Inc. v. Windsor,
521 U.S. 591 (1997) 7

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 15

Avritt v. Reliastar Life Ins. Co.,
615 F.3d 1023 (8th Cir. 2010) 6

Bates v. United Parcel Serv., Inc.,
511 F.3d 974 (9th Cir. 2007) 7

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 16

Bouaphakeo v. Tyson Foods, Inc.,
765 F.3d 791 (8th Cir. 2014) 12

Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998) 13

Butler v. Sears, Roebuck & Co., 702 F.3d 359 (7th Cir. 2012), *cert. granted, judgment vacated*, 133 S. Ct. 2768 (2013), *on remand*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014) 10, 11

Castano v. Am. Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 16

Clapper v. Amnesty Int'l USA,
133 S. Ct. 1138 (2013) 17

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013) 2

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 15

Christian Sch. Tuition Org. v. Winn,
131 S. Ct. 1436 (2011) 6

Daffin v. Ford Motor Co.,
458 F.3d 549 (6th Cir. 2006) 10

Denney v. Deutsche Bank AG,
443 F.3d 253 (2d Cir. 2006) 6

DG ex rel. Stricklin,
594 F.3d 1188 (10th Cir. 2010) 7

Duran v. U.S. Bank Nat'l Ass'n,
325 P.3d 916 (Cal. 2014) 14

Gen. Motors Corp. v. City of New York,
501 F.2d 639 (2d Cir. 1974) 16

In re "Agent Orange" Prod. Liab. Litig.
818 F.2d 145 (2d Cir. 1987) 16

In re Barnes & Noble Pin Pad Litig., No. 12-8617,
2013 WL 4759588 (N.D. Ill. Sept 3, 2013) 17

In re ConAgra Foods, Inc., -- F. Supp.3d --,
No. CV 11-05379 MMM, 2015 WL 1062756
(C.D. Cal. Feb. 23, 2015) 11

In re Deepwater Horizon,
739 F.3d 790 (5th Cir. 2014) 7

In re Hannaford Bros. Co. Data Sec. Breach
Litig., 293 F.R.D. 21 (D. Me. 2013) 17

In re New Motor Vehicles Canadian Export Anti-
trust Litig., 522 F.3d 6 (1st Cir. 2008) 14

In re Nexium Antitrust Litig.,
777 F.3d 9 (1st Cir. 2015) 10

In re Polyurethane Foam Litig., No. 1:10 MD
2196, 2014 WL 6461355 (N.D. Ohio Nov. 17,
2014) (unredacted opinion of Apr. 9, 2014),
23(f) *pet. denied sub nom. In re: Carpenter*
Co. (6th Cir. Sept. 29, 2014), *cert. denied sub*

nom. Carpenter, Co. v. Ace Foam, Inc., No. 14-577, 2015 WL 852426 (U.S. Mar. 2, 2015)..... 14

In re Prudential Ins. Co. Am. Sales Practices Litig. Agent Actions, 148 F.3d 283 (3d Cir. 1998) 7

In re: Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013)..... 9

In re Sci. Applications Int'l Corp. Backup Tape Data Theft Litig., MDL No. 2360, 2014 WL 1858458 (D.D.C. May 9, 2014) 17

In re Urethane Antitrust Litig., 768 F.2d 1245 (10th Cir. 2014), *petition for cert. filed* (Mar. 9, 2015) 11

In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 678 F.3d 409 (6th Cir. 2012), *cert. granted, judgment vacated sub nom. Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013), *on remand*, 722 F.3d 838 (6th Cir. 2013), *cert denied*, 134 S. Ct. 1277 (2014)..... 10, 11

Jimenez v. Allstate Ins. Co., 765 F.3d 1161 (9th Cir. 2014), *pet. for cert. filed* (Jan. 24, 2015) (No. 14-910)..... 13

Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672 (7th Cir. 2009) 6

Kottaras v. Whole Foods Market, Inc., 281 F.R.D. 16 (D.D.C. 2012)..... 10

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)..... 6

Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012) 7, 9

McLaughlin v. Am. Tobacco Co.,
522 F.3d 215 (2d Cir. 2008) 13

Messner v. Northshore Univ. Healthsystem,
669 F.3d 802 (7th Cir. 2012) 9

Mims v. Steward Title Guar. Co.,
590 F.3d 298 (5th Cir. 2009) 7

Parko v. Shell Oil Co.,
739 F.3d 1083 (7th Cir. 2014) 9

Raines v. Byrd, 521 U.S. 811 (1997) 5

Sam's East, Inc., No. 12-2618,
2013 WL 3756573 (D. Kan. July 16, 2013) 17

Stearns v. Ticketmaster Corp.,
655 F.3d 1013 (9th Cir. 2011) 7

Suchanek v. Sturm Foods, Inc.,
764 F.3d 750 (7th Cir. 2014) 10

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 2, 14

Wolin v. Jaguar Land Rover N. Am., LLC,
617 F.3d 1168 (9th Cir. 2010) 11

Statutes

28 U.S.C. § 2072 7

Other Authorities

Paul M. Barrett, *Whirlpool Wins 'Smelly Washer' Test Case, With More Trials to Come*,
Bloomberg Business, Nov. 5, 2014, *at* http://
www.bloomberg.com/bw/articles/2014-11-05/

whirlpool-wins-smelly-washer-test-case-with-more-trials-to-come 16

Henry J. Friendly, Federal Jurisdiction: A General View (1973) 16

Kenneth L. Racowski, *No Consensus on Application of 'Comcast v. Behrend'*, Legal Intelligencer, Mar. 31, 2015, *at* http://www.thelegalintelligener.com/litigation/id=1202721836338/No-Consensus-on-Application-of-Comcast-v-Behrend 2

INTEREST OF *AMICI CURIAE*[1]

Amici are organizations representing manufacturers and those concerned with the fairness of the civil justice system. *Amici* are concerned that courts, such as the Eighth Circuit here, are allowing use of statistical models that gloss over material differences among class members and allow overbroad certification of classes that include uninjured members.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring

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[1] Per Rule 37.2, counsel of record for all parties received notice of Amici's intention to file this brief at least ten days prior to its due date. The parties have filed a blanket letter of consent with the Clerk of the Court. Per Rule 37.6, Amici states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the Amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The Metals Service Center Institute ("MSCI"), more than 100 years strong, is the broadest-based, not-for-profit association serving the industrial metals industry. As the premier metals trade association, MSCI provides vision and voice to the metals industry, along with the tools and perspective necessary for a more successful business. MSCI's 400 member companies have over 1,500 locations throughout North America.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court warned against "Trial by Formula" in *Wal-Mart Stores, Inc. v. Dukes*, instructing courts that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury," not "merely that they have all suffered a violation of the same provision of law." 131 S. Ct. 2541, 2551, 2561 (2011) (internal citation omitted). The Court further required in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), a close tie between damage models and the theory of liability.

Yet, the Eighth Circuit here and other federal courts continue to accept creative theories for both liability and damages that give short shrift to *Wal-Mart* and *Comcast*.[2] Through use of statistical mod-

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[2] *See* Kenneth L. Racowski, *No Consensus on Application of 'Comcast v. Behrend'*, Legal Intelligencer, Mar. 31, 2015, *at* http://www.thelegalintelligencer.com/litigation/id=1202721836338/No-Consensus-on-Application-of-Comcast-v-Behrend.

els, such as sampling, courts allow plaintiffs to mask their inability to fulfill core standing and class certification requirements. Such methods contribute to a rise of class actions with significant numbers of uninjured and dissimilar plaintiffs, not just in wage-and-hour litigation, but in antitrust, product liability, consumer and other types of claims.

Here, Plaintiffs used statistical modeling to create a fictional plaintiff as the basis for seeking class certification. The need for such a technique should have been a clear signal that the actual Plaintiffs could not meet the standards required for class certification. Plaintiffs allege that Tyson Foods did not pay overtime for workers who had to don and doff protective gear. Yet, the workers varied widely in the type and amount of protective gear required, whether they used optional gear, the positions they held, whether they were paid an additional fixed wage for donning and doffing gear, and whether donning and doffing time was compensated as part of their shifts. *See* Pet. at 4-7. Further, as Plaintiffs' own expert observed, the time spent donning gear ranged from thirty seconds to ten minutes for employees who worked on the processing floor and doffing gear from twelve seconds to approximately six minutes for those on the slaughter floor. *See* Pet. at 9. The claim of each plaintiff requires evidence and defenses specific to that employee's situation.

To shoe-horn these disparate claims into a purported class, Plaintiff sampled a small, self-selected group of employees to create an "average employee." This modeling overstates Plaintiff's allegations: the sample was too small to produce valid results, it suffered from selection bias as Plaintiff's expert conced-

ed the sample was not "random," and the results had a wide margin of error. Nevertheless, Plaintiffs were allowed to compute an aggregate award based on the fictional average employee, regardless of any actual damages each employee actually sustained.

The problem with such sampling techniques is they can allow Plaintiffs to hide the deficiencies of individual class member claims. Here, even under their own rose-colored methodology, Plaintiffs' expert acknowledged that at least two hundred class members were fully compensated for donning and doffing their gear and had no injury. Plaintiffs' sampling techniques also overlooked the key distinctions among class members discussed above. Statistical sampling and other aggregation tools must be used to resolve common issues of law and fact, not avoid inconvenient differences.

The class action mechanism can be valuable when efficiently producing results comparable to what could be achieved in individual claims. Yet, as discussed below, many lower courts are not properly following *Wal-Mart* and *Comcast* and are certifying class actions when there is insufficient real evidence to bind the members. This case presents a needed opportunity for the Court to emphasize that district courts must give "rigorous analysis" at the class certification stage. Courts must ensure that statistical modeling is not used to mask the inability of plaintiffs to meet their basic substantive and procedural burdens or overcome the due process rights of defendants. *Amici* respectfully request the Court to grant *certiorari* and reverse the decision below.

ARGUMENT

I. STATISTICAL SAMPLING SHOULD NOT BE ALLOWED TO OBSCURE THE INCLUSION OF UNINJURED CLASS MEMBERS

The Petition should be granted to assure that Plaintiffs cannot use statistical sampling to obscure a fundamental element of a civil claim: injury. *See Raines v. Byrd*, 521 U.S. 811, 818 (1997) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."). Review is needed to reconcile the widely divergent views of the U.S. Courts of Appeals on whether and, if so, under which conditions a court may certify a class with uninjured members.

As discussed below, some Circuits follow what *amici* view as the proper approach of assuring that all class members have injury, and, therefore, standing, as a prerequisite to class certification. Others allow the certification of classes that include some, many, or even mostly uninjured individuals, so long as a class representative can establish injury. Even in the latter group, statistical modeling can artificially deflate the number of injured plaintiffs in an effort to vault over whatever bar that Circuit uses.

A. Principles of Standing Should Preclude Courts From Certifying Classes That Include Members Who Have No Injury

This case presents this Court with an important opportunity to address a Circuit split on the threshold question of whether Article III standing even permits certification of a class with uninjured mem-

bers. This Court has cautioned that "courts must be more careful to insist on the formal rules of standing, not less so" in the era of class actions, *Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011), but the Circuits remain deeply divided on this issue.

The Second Circuit has correctly held that "no class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). A class must be "defined in such a way that anyone within it would have standing." *Id.* Other circuits have followed this approach, recognizing that injury-in-fact is the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff who cannot show injury fairly traceable to the challenged defendant's action cannot hide in the crowd of those who may. *See, e.g., Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves").

In contrast, the Seventh Circuit has taken a nearly polar opposite view, allowing courts to ignore the presence of uninjured class members at the class certification stage. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). In *Kohen*, the Seventh Circuit explained that it is "almost inevitable" that a "class will often include persons who have not been injured by the defendant's conduct because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown." *Id.* at 677. The Tenth and Third Circuits have followed a similar path, holding that only the named plaintiff must have standing before certifica-

tion. *See id.* at 676; *see also DG ex rel. Stricklin*, 594 F.3d 1188, 1197-98 (10th Cir. 2010); *In re Prudential Ins. Co. Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 306-07 (3d Cir. 1998). These rulings, though, run afoul of this Court's instruction that procedural rules, including Rule 23, "shall not abridge, enlarge or modify any substantive right." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting Rules Enabling Act, 28 U.S.C. § 2072(b)).

Other circuits send mixed messages. For example, the Ninth Circuit cited *Denney* with approval in vacating certification of a nationwide consumer protection claim as overbroad where it was "likely that many class members were never exposed to the allegedly misleading advertisements" of an automaker. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594-96 (9th Cir. 2012). Months earlier that Circuit found that "standing is satisfied if at least one named plaintiff meets the requirements." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020-21 (9th Cir. 2011) (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc)).

Similarly, the Fifth Circuit relied on *Kohen* in ruling that "[c]lass certification is not precluded simply because a class may include persons who have not been injured by defendant's conduct." *Mims v. Steward Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) (citation omitted). Though, more recently, it declined to choose between the *Denney* or *Kohen* approaches. *See In re Deepwater Horizon*, 739 F.3d 790, 802 (5th Cir. 2014) (finding absent class members alleged sufficient injury and causation under both tests to support certification of a settlement class).

As in the case at bar, the inclusion of uninjured plaintiffs can falsely inflate the size of a class and improperly increase liability. It also could create disproportionate pressure for companies to settle claims regardless of merit. The Court should grant the Petition to address these issues and hold, consistent with Article III, that a federal court must determine at the certification stage whether class members lack injury and, if so, reject certification.

B. The Presence of Uninjured Class Members Has Become Problematic in Many Types of Class Actions

The issues presented in this case have a direct impact on courts that do not disqualify classes with uninjured plaintiffs on standing grounds. These courts have struggled with whether and when the inclusion of uninjured plaintiffs can satisfy the Rule 23 requirements that common issues of law and fact predominate and that the claims of class representatives, who may have injury, are typical of class members who do not. As the cases below show, these issues arise in wage-and-hour cases, such as the one here, as well as a wide variety of other types of class actions, including product liability, antitrust, consumer, and statutory claims. Thus, even if the Court does not bar claims as a matter of standing, the Court should grant the Petition to give guidance on when, if ever, classes can meet certification requirements when they include uninjured plaintiffs.

Some courts, rather than deny class certification on standing grounds when they include uninjured members, have held that such claims do not satisfy Rule 23's commonality and typicality requirements. *See, e.g., In re: Rail Freight Fuel Surcharge Antitrust*

Litig., 725 F.3d 244, 253 (D.C. Cir. 2013) (reversing class certification where plaintiffs' model for showing class-wide damages did not distinguish shippers who were overcharged from those who were not); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (finding the class failed to meet certification standards where the class included members that did not see and could not have relied on the allegedly misleading advertising material). The Eighth Circuit should have followed this path in the case at bar.

Other courts have adopted a vast array of approaches to uninjured members in a class, with splits existing among and within the circuits. Several circuits have sought to identify a tipping point where the proportion of uninjured class members precludes certification. The Seventh Circuit, for example, held in *Kohen* that "a class should not be certified if it is apparent that it contains a *great many* persons who have suffered no injury at the hands of the defendant." 571 F.3d at 677-78 (emphasis added). Another Seventh Circuit panel ruled that "[t]here is no precise measure for 'a great many' and that "if a proposed class consists largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof." *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 819, 824-25 (7th Cir. 2012). A third panel found that even if class members were uninjured, their lack of injury was irrelevant to certification. *See Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084-87 (7th Cir. 2014). Finally, a fourth panel held that if a class representative's claim "is idiosyncratic or possibly unique" because others do not share that injury, then (s)he is an un-

suitable class representative. *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757-58 (7th Cir. 2014).

The First Circuit favors a "de minimis" standard, holding not every putative class member must establish injury, and that it will certify a class where the number of uninjured members is "de minimis." *In re Nexium Antitrust Litig.*, 777 F.3d at 21. Several district courts have held that a class with uninjured members can be certified if there is common evidence of "widespread injury to the class" or that a "substantial majority" or "nearly all" members" experienced injury. *See, e.g., Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 23 (D.D.C. 2012); *In re Polyurethane Foam Litig.*, No. 1:10 MD 2196, 2014 WL 6461355, at *17 (N.D. Ohio Nov. 17, 2014) (unredacted opinion of Apr. 9, 2014), 23(f) *pet. denied sub nom. In re: Carpenter Co.* (6th Cir. Sept. 29, 2014), *cert. denied sub nom. Carpenter, Co. v. Ace Foam, Inc.*, No. 14-577, 2015 WL 852426 (U.S. Mar. 2, 2015).

Further, the Sixth and Seventh Circuits have held that class certification could be based on the mere fact that the named plaintiff and class shared a common question about the product, *i.e.*, whether it was defective, making the inclusion of injured claimants a moot point at the certification stage. *See Whirlpool*, 722 F.3d at 855 (citing *Daffin v. Ford Motor Co.*, 458 F.3d 549, 555-56 (6th Cir. 2006)); *Butler*, 727 F.3d at 801. The Court is familiar with the washing machine litigation, in which it vacated and remanded two certified cases in light of *Comcast* then denied further review after the courts reinstated class certification. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409 (6th Cir. 2012), *cert. granted, judgment vacated sub*

nom. Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013), *on remand*, 722 F.3d 838 (6th Cir. 2013), *cert denied*, 134 S. Ct. 1277 (2014); *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *cert. granted, judgment vacated*, 133 S. Ct. 2768 (2013), *on remand*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). Both courts rejected this Court's instructions, allowing plaintiffs' creative pleading that many washing machine owners without a mold issue were injured merely by purchasing a product from a product-line where other products in that line were allegedly defective. *See* 722 F.3d at 856 (concluding these owners paid a premium price for a machine from a non-defective line of products).[3]

Even in some of these cases, courts have held that uninjured class members not excluded at the certification stage must be addressed through individual determinations of damages. *See, e.g., In re Nexium Antitrust Litig.*, 777 F.3d 9, 20-21 (1st Cir. 2015). Under these rulings, the courts are to ensure that "defendants will not pay, and the class members will not recover, amounts attributable to uninjured class members, and judgment will not be entered in favor of such members." *In re Nexium*, 777 F.3d at 21-22.

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[3] *See also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010) (plaintiffs who experienced premature tire wear could represent tire owners who did not); *In re ConAgra Foods, Inc.*, -- F. Supp.3d --, No. CV 11-05379 MMM, 2015 WL 1062756, at *27, *64-65 (C.D. Cal. Feb. 23, 2015) (certifying class based on a fictional "reasonable" consumer); *In re Urethane Antitrust Litig.*, 768 F.2d 1245, 1254 (10th Cir. 2014), *petition for cert. filed* (Mar. 9, 2015) (observing in an antitrust case that some plaintiffs "avoid[ed] injury.").

Thus, the case at bar would have fared differently based on the circuit where it was heard. In some circuits, it would have been dismissed outright. In others, the use of statistical modeling to artificially deflate the number of uninjured plaintiffs could have improperly pushed the class over the circuit's threshold for certifying classes with uninjured members. Also, the district and appellate courts did not provide even the minimal safeguard of assuring that uninjured class members receive no recovery through individual determination of damages. *See Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 804-05 (8th Cir. 2014) (Bean, J., dissenting) (finding it inappropriate that "each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict").

The Court should frown on such opportunities for litigation gamesmanship. It should clarify whether, and if so when, district courts can certify classes that include uninjured members, notwithstanding the issue of standing. It also should require courts to assure at the certification stage that models do not falsely mask the amount of class members who have not experienced any injury. The federal judiciary must make sure that Rule 23 does not open a path where uninjured plaintiffs receive a windfall, those with significant losses are undercompensated, and defendants' due process rights are violated.

II. THE COURT SHOULD SET GUIDELINES FOR WHEN, IF EVER, STATISTICAL MODELS CAN OVERCOME DISTINCTIONS AMONG CLASS MEMBERS

Aside from issues of uninjured plaintiffs, the use of statistical modeling, generally, can be a clear sig-

nal that the proposed class is simply too diverse, with too many variables to meet the commonality requirement of Rule 23. When plaintiffs, as they did here, resort to creating a "fictional typical" class member it should be "a caution signal to the district court that classwide proof of damages [is] impermissible." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). Certifying classes based on such models "would inevitably alter defendants' substantive right to pay damages reflective of their actual liability." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).

Such cases regularly come before federal courts, making this Petition an important vehicle for assuring that courts do not turn a blind eye to the impropriety of models that distort key elements of class certification and the rights of the defendants. In the two years since the *Comcast* decision, there are still clear inconsistencies among the courts. For example, the Tenth Circuit recently allowed an aggregate damages approach that relied on the creation of an average plaintiff, as here. *See In re Urethane Antitrust Litig.*, 768 F.3d at 1251-54 (involving the same expert whose damages theory this Court rejected in *Comcast*). The Court of Appeals baldly, and wrongly, concluded that a defendant "has no interest in the method of distributing the aggregate damages award among the class members." *Id.* at 1269.

The Ninth Circuit also affirmed certification in a class action last year where "statistical sampling and representative testimony" were similarly deemed "acceptable ways to determine liability." *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014), *pet. for cert. filed* (Jan. 24, 2015) (No. 14-

910). The Ninth Circuit did not go as far as the Tenth Circuit, though, finding that the defendant's right to a fair and accurate resolution of the claims could be adequately safeguarded by allowing the defendant to present individualized defenses in a separate damages phase. *See id.* at 1168.

Such legal gymnastics should signal, as the First Circuit has previously held, that the use of a formula may be an effort to "absolve[] plaintiffs from the duty to prove each class member was harmed by the defendants' practice." *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) (citation and alteration omitted). Yet, that is what is happening in the district courts. In a lower court case involving antitrust allegations last year, plaintiffs were allowed to assume that all purchasers uniformly paid the exact same overcharge despite the fact that each purchaser individually negotiated his or her own prices. *See In re Polyurethane Foam Litig.*, 2014 WL 6461355, at *3. This damages model, like the one at bar which did not account for class members paid for donning and doffing time, failed to account for evidence showing that some purchasers absorbed, rather than passed on to customers, price increases due to the overcharges. *Id.*

As this Court made clear in *Wal-Mart*, courts should not replace actual evidence with novel sampling and mathematical projects that obscure the accurate resolution of individual claims. *See Wal-Mart*, 131 S.Ct. at 2561. Last year, the California Supreme Court followed *Wal-Mart* properly. *See Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916 (Cal. 2014). As here, the modeling was based on a small sample without evidence that those chosen would produce a

result that could be "fairly extrapolated to the entire class." *Id.* at 922-23, 940-41. While the court did not categorically bar statistical sampling, it cautioned that any "statistical plan for managing individual issues must be conducted with sufficient rigor" and recognized that "[s]tatistical methods cannot entirely substitute for common proof." *Id.* at 933.

This Court should grant *certiorari* to ensure that federal courts also follow the Court's rulings. Courts must not allow statistical sampling to gloss over significant differences between class members that would otherwise preclude class certification. Also, where statistical sampling is used, courts should make sure that (a) there is a legitimately representative sample, (b) individual defenses to liability are preserved, and (c) each class member would receive compensation reflecting actual losses. The Eighth Circuit's decision to affirm the class in the case at bar adhered to none of these principles.

III. ALLOWING PLAINTIFFS TO OBSCURE DEFICIENCIES IN THEIR CASES WILL ENCOURAGE SPECULATIVE LITIGATION

The importance of granting *certiorari* and requiring courts to rigorously analyze statistical models before certifying a class is underscored by this Court's observation that certification "may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). The pressure to settle class actions once certified is significant. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (with "even a small chance

of a devastating loss, defendants will feel significant "pressure[ ]" to settle "questionable claims"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 599 (2007) (the threat of expensive litigation "will push cost-conscious defendants to settle even anemic cases").

In the washing machine litigation discussed above, Whirlpool was one of the few defendants willing to take a class action to trial and won a favorable verdict. *See* Paul M. Barrett, *Whirlpool Wins 'Smelly Washer' Test Case, With More Trials to Come*, Bloomberg Business, Nov. 5, 2014, *at* http://www.bloomberg.com/bw/articles/2014-11-05/whirlpool-wins-smelly-washer-test-case-with-more-trials-to-come. Such exoneration is illusive for many companies, particularly in massive consumer protection, antitrust, or employment disputes. Businesses have a long history of settling tenuous claims when purported classes are certified, regardless of the merits. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.* 818 F.2d 145, 151 (2d Cir. 1987) (affirming $180 million class settlement even though it was clear the trial court "viewed the plaintiffs' case as . virtually baseless"); *cf.* Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973) (labeling such resolutions as "blackmail settlements").[4]

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[4] As courts have explained, "the sheer size and complexity of the action, the added time, expense and effort needed to defend it as a class suit may force the defendant, despite the doubtful merit of the claims, to settle rather than to pursue the long and costly litigation route." *Gen. Motors Corp. v. City of New York*, 501 F.2d 639, 657-58 (2d Cir. 1974) (Mansfield, J., concurring). "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996).

If the Court denies the Petition, businesses will undoubtedly face an increasing number of highly speculative, creative class actions. The Eighth Circuit's decision to allow certification of an overbroad class, the inclusion of numerous uninjured members, and allowing class members to collect pro rata shares of aggregate damages regardless of actual losses is sure to invite meritless and speculative class actions.

For example, in the past few years, a new area of litigation rife with such attempts has sprung in the area of privacy and data security. In these class actions, few if any of the claimants have sustained any economic loss. Many courts, following *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013), have properly dismissed classes with uninjured claimants for lack of standing.[5] Inventive class action plaintiffs' attorneys have responded by developing novel damages theories, which include statistical sampling, to create an "average" loss. *See, e.g., In re Hannaford Bros. Co. Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying class certification because plaintiffs had not developed the expert testimony, but not postulating as to whether the modeling would have been valid if presented).

Courts could use guidance on how to approach the novel modeling theories put forth in the case at bar. There may be legitimate uses for statistical models in litigation, but not as a substitute for having to sat-

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[5] *See, e.g., In re Sci. Applications Int'l Corp. Backup Tape Data Theft Litig.*, MDL No. 2360, 2014 WL 1858458 (D.D.C. May 9, 2014); *In re Barnes & Noble Pin Pad Litig.*, No. 12-8617, 2013 WL 4759588 (N.D. Ill. Sept 3, 2013); *Sam's East, Inc.*, No. 12-2618, 2013 WL 3756573 (D. Kan. July 16, 2013).

isfy the plaintiffs' key substantive and procedural elements of a class action.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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